(21) (18)

Nos. 03-1164 & 03-1165

Supreme Court, U.S
FILED
OCT 15 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

ANN M. VENEMAN,
SECRETARY OF AGRICULTURE, *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JOSEPH AND BRENDA COCHRAN AND THE INSTITUTE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM H. MELLOR
STEVEN M. SIMPSON
Counsel of Record
SCOTT G. BULLOCK
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTERESTS OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. FREEDOM OF ASSOCIATION IS A FUNDAMENTAL RIGHT THAT PROMOTES THE DUAL VALUES OF FREEDOM OF CONSCIENCE AND DEMOCRATIC SELF GOVERNMENT	8
II. THE BEEF ACT CONFLICTS WITH THE CONSTITUTIONAL VALUES THE RIGHT OF ASSOCIATION PROMOTES	13
A. The Implicit Assumption Of The Beef Act Is That Government And Certain Producers Are Entitled To Speak For The Entire Industry	14
B. The Beef Act Skews The Democratic Process Against Dissenting Producers	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES:

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 19

Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977) 6, 8, 11, 12, 16, 19

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 10, 12, 15

Elrod v. Burns, 427 U.S. 347 (1976) ..... *passim*

Hurley v. Irish-American Gay Group of Boston, 515 U.S. 557 (1995) ..... *passim*

Keller v. State Bar of California, 496 U.S. 1 (1990) ... 6, 11, 12

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 19

NAACP v. Alabama, 357 U.S. 449 (1958) 8, 13, 16

NAACP v. Button, 371 U.S. 415 (1963) 13

Riley v. Nat'l Federation of the Blind, 487 U.S. 781 (1988) 19

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 9, 10, 12

United States v. United Foods, 533 U.S. 405 (2001) ... 13, 15, 19

Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 20

Wooley v. Maynard, 430 U.S. 705 (1976) 6

STATUTES AND CONSTITUTIONAL PROVISIONS:

1st Am., U.S. Const. ..... *passim*

Beef Promotion and Research Act of 1985 (the "Beef Act"), 7 U.S.C. § 2901 *et seq.* ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

7 U.S.C. § 2904(1) 4

7 U.S.C. § 2904(4) 4

7 U.S.C. § 2904(8) 3

7. U.S.C. § 2906(b) 5, 20

7 C.F.R. § 1260.141 4

7 C.F.R. § 1260.172 3

MISCELLANEOUS PUBLICATIONS:

http://www.beef.org 4

http://www.beefitswhatsfordinner.com 4

http://www.beefitswhatsfordinner.com/footer/about us.asp 4

http://www.beefitswhatsfordinner.com/askexpert/default.asp 4

Beef Checkoff Educates Consumers About Irradiated Beef, May 12, 2004 (available at http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1054&contentId=2622&contentTypeId=2) 17

http://www.beefboard.org/documents/irradiation.pdf 17

http://www.zip4tweens.com/why.html 17

http://www.zip4tweens.com/along/cognition.html 17

http://www.2424milk.com/ 18

http://www.whymilk.com/moms/images/weightloss_ad.jpg 18

http://www.otherwhitemeat.com/allaboutpork/nutrition/porksPerfect.html 18

INTERESTS OF *AMICI CURIAE*[1]

Joseph and Brenda Cochran own a small, family-operated dairy farm in Tioga County, Pennsylvania. They are the respondents in *Veneman, et al. v. Cochran*, Case Nos. 04-166 and 04-0446, in which petitions for certiorari were filed on August 2, 2003 and September 30, 2004, respectively. Those cases involve constitutional challenges to the Dairy Promotion Act, which is very similar to the Beef Promotion and Research Act of 1985 (the "Beef Act") at issue in this case. The Dairy Promotion Act compels dairy producers like the Cochrans to pay assessments on the milk they sell to fund generic advertising programs similar to those funded by the Beef Act. The Cochrans are also subject to mandatory assessments under the Beef Act when they periodically sell cows or calves, whether or not the animals are used for their beef.

The Cochrans object to the advertising under the dairy and beef programs, and they object to being required to associate with the boards that operate these programs and with other farmers in order to promote a message with which they disagree. The Cochrans are traditional dairy farmers who practice less intensive farming methods than larger-scale commercial dairy farmers. The Cochrans attempt to balance the desire to produce a large volume of milk with a concern for the health of their cows, the longevity of their herd, and the impact of their farming on the environment. Thus the Cochrans allow their cows

---

[1] The parties in the case have consented to the filing of this *amicus* brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

more time and room to graze and calve than many farmers, and they do not use bovine growth hormone. While their methods may produce less milk than more intensive farming methods, the Cochrans are able to keep their cows longer and have a lower culling rate than many other dairy farmers. The Cochrans believe that this is a worthwhile trade off because they believe their methods promote a better use of resources, protect the environment, and provide a healthier product.

The Cochrans do not believe that milk and beef are merely generic products that bear no distinction based on how and by whom they are produced. As traditional farmers, the Cochrans take pains to produce milk in a particular manner, and they object to being lumped together with all other dairy farmers and forced to promote the message that all milk is the same.

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty and restoring constitutional limits on the power of government. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves the government's ability to compel individuals and corporations to associate and to fund speech concerning their chosen businesses. As such, it implicates the Institutes' interest in the full protection of speech involving commercial pursuits, which includes both the right of Americans to speak and associate freely, as well as their corresponding right to remain silent and independent.

The Institute and the Cochrans file this brief in support of the Respondents to highlight the adverse impact of programs such as the Beef Program on the right of association and to emphasize that the advertisements sponsored by promotional acts such as the Beef Act often contain content with which many producers disagree.

STATEMENT OF THE CASE

Respondents are five cattle producers and two trade associations who have voluntarily joined forces to oppose an *involuntary* government-enforced program that compels them to associate with other beef producers and organizations to promote a message with which they disagree.

Under the Beef Promotion and Research Act of 1985 (the "Beef Act"), 7 U.S.C. § 2901 *et seq.*, all producers and importers of beef must pay $1 per head of cattle they sell (which is often referred to as the "beef checkoff") to finance a promotional program designed to "advance the image and desirability of beef and beef products." 7 U.S.C. § 2904(8); 7 C.F.R. § 1260.172. Producers must pay this assessment regardless of whether they agree with the advertising and promotional programs sponsored by the Beef Act, and whether or not the cattle subject to the assessments are ever used for their meat. The Cochrans, for instance, often sell cows subject to mandatory assessments under the Beef Act that are used for breeding or as dairy cows, rather than for their meat.

To administer the program, the Beef Act authorizes the creation of a Cattlemen's Beef Promotion and Research

Board (the "Beef Board"), which is composed of private beef producers and importers nominated by state beef-producer organizations and approved by the Secretary of Agriculture. 7 U.S.C. § 2904(1); 7 C.F.R. § 1260.141. The Beef Act also authorizes the creation of a Beef Promotion Operating Committee (the "Operating Committee"), which is responsible for developing specific promotional, advertising and research projects under the Act. 7 U.S.C. § 2904(4). The Operating Committee is composed of ten members of the Beef Board and ten "producers elected by a federation that includes as members the qualified State beef councils." *Id*. That federation is the Checkoff Division of the National Cattlemen's Beef Association ("NCBA"). The NCBA is a private trade association that works in close conjunction with the Beef Board in developing and implementing advertising and promotional programs under the Beef Act.[2]

In promotional literature, the Beef Board has described the beef program as an industry self-help program, created, financed, and operated by and for private beef producers. J.A. 81, 93, 102. The Board has described itself as "an independent organization of 111 'grassroots' volunteers"

[2] The website of the NCBA, http://www.beef.org, prominently features a link from its homepage to a website sponsored by the Beef Board, http://www.beefitswhatsfordinner.com/. The websites appear for all intents and purposes to be one and the same. The Beef Board's website states that the "NCBA is a contractor of Checkoff dollars used for beef promotion and research efforts on behalf of the Beef Board." *See* http://www.beefitswhatsfordinner.com/looter/aboutus.asp. The site describes the NCBA as the "nonprofit domestic planning and marketing organization responsible for increasing demand for U.S.-produced beef" that "works on behalf of America's Beef Producers and is contracted by the Cattlemen's Beef Promotion and Research Board." *See* http://www.beefitswhats fordinner.com/askexpert/default.asp.

and has likened the program to a corporation with beef producers as the "shareholders," which, like any private corporation, is subject to government oversight to "ensure program accountability." J.A. 81, 89, 101-102. Advertisements financed under the Beef Act often carry the copyright insignia of the "National Cattleman's Beef Association and Cattlemen's Beef Board" and often purport to be made in the name of "America's Beef Producers." J.A. 51-53.[3] In promotional materials that are directed to beef producers, the Beef Board often refers to the program as "our beef checkoff" and suggests that the program represents the interests of all beef producers. J.A. 93, 89-94.

Respondents, who do not believe the beef program represents their interests and do not agree with the advertising under the program, brought suit after trying in vain to convince the Secretary to conduct a referendum under 7 U.S.C. § 2906(b) so that they could attempt to convince other producers to vote the program down. Respondents believe that American beef is superior to imported beef and object to being required to fund advertising that suggests that all beef is the same. Respondents also object to being required to associate for expressive purposes with the Beef Board, the NCBA, and other producers who hold different views about beef and how best to promote it. J.A. 34-37; 58-80. The district court ruled that the Beef Act and order violated the First Amendment by requiring beef producers to fund speech with which they disagree. Pet. App. 31a-61a. The Eighth

[3] The Beef Board's website, http://www.beefitswhatsfordinner.com, carries the copyright insignia "© Cattlemen's Beef Board" and states that the site is "Funded by America's Beef Producers."

Circuit affirmed. *Id.* at 1a-30a. The court rejected the Secretary's argument that the Beef Act amounted to a program of government speech, concluding instead that the Act compelled individuals to finance a program of private speech. The court then concluded that the Beef Act failed intermediate scrutiny under the First Amendment because the government's interest in promoting beef was not sufficiently substantial to justify the infringements on dissenting producers' First Amendment rights. *Id.* at 28a.

SUMMARY OF ARGUMENT

It has long been clear that the First Amendment protects not only the right to speak freely but the right to refrain from speaking; not only the right to associate freely with others, but the right to refrain from associating. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1976); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977). Equally clear is that just as the government may not prohibit individuals from funding speech or expressive associations with which they agree, so it may not compel them to do so when they dissent. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1, 9-10 (1990). In the words of Thomas Jefferson, on which this Court has relied in the past, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Id.* at 10 (quoting *Abood*, 431 U.S. at 234-35 n. 31).

While the primary focus in this case has been on the Beef Act's implications for Respondents' rights of free speech, checkoff programs like that authorized under the Beef Act have serious implications for the fundamental

right of association as well. Freedom of association arises from the fact that to exercise the other rights protected under the First Amendment, individuals must often associate and make common cause with others. Accordingly, this Court's precedents establish unequivocally that the First Amendment protects individual autonomy to choose whether to associate with others and what messages to promote. In this manner, the right of association protects not only freedom of conscience, but the free and open debate and diversity of views that is vital to our republican form of government. Thus, government violates the right of association just as much when it compels individuals to associate as when it prevents them from associating.

The Beef Act works a significant infringement on beef producers' right of association. The expressed purpose of the Beef Act is to compel *all* beef producers to engage in a concerted effort to promote beef, whether they wish to or not. Individual producers must finance that effort, whether or not they agree with its messages and goals and whether or not they agree with the various associations that set the agenda under the Beef Act and decide what messages to promote. While it is common to describe advertising under the Beef Act as "generic" because it promotes beef as a generic product, the Beef Board and Operating Committee enjoy broad discretion to create promotional and advertising programs that make a wide variety of claims and contain different messages. There is, in short, much for dissenting producers to object to. Moreover, advertising and promotional materials financed by the Beef Act often contain the label "Sponsored by America's Beef Producers," thus attributing views and positions to all beef producers, even those who disagree.

Indeed, the Beef Act is mandatory precisely because the government and beef producers who support the Act's goals feared that advertising in the industry would falter if individual producers were left free to decide their own message and how best to promote their products.

Thus, the very premise on which the Beef Act operates – the assumption that government and certain beef producers know best what messages to adopt and are entitled to speak for the entire industry – is anathema under the First Amendment. As this Court has made clear many times in many different context, the core assumption of the First Amendment is that individual speakers and listeners decide whether and when to speak and what to say, not government. This principle applies as much to beef producers in their efforts to promote, or not promote, their products as it does to anyone else.

ARGUMENT

I. FREEDOM OF ASSOCIATION IS A FUNDAMENTAL RIGHT THAT PROMOTES THE DUAL VALUES OF FREEDOM OF CONSCIENCE AND DEMOCRATIC SELF GOVERNMENT.

The right of individuals to associate to express opinions and advance beliefs is one of the fundamental freedoms the First Amendment protects. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purposes of advancing beliefs and ideas is protected by the First and Fourteenth Amendments."); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("It is beyond dispute that freedom to engage in association for the advancement of beliefs and ideas is an

inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). The right of association arises from the fact that the effective exercise of other liberties protected under the First Amendment often requires group effort. As this Court has stated,

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

The right of association thus performs a dual function under our constitutional system. First, it protects freedom of conscience by leaving to individuals the choice to join or not to join with others to express views on matters of importance to them. *See Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995). As this Court has stated, "'[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Elrod v. Burns*,

427 U.S. 347, 356 (1976) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Second, freedom of association preserves our republican form of government by promoting a diversity of views and free and open competition in the marketplace of ideas. Protections for the related rights of association and speech "reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . a principle itself reflective of the fundamental understanding that '[c]ompetition in ideas and governmental policies is at the core of our electoral process.'" *Elrod*, 427 U.S. at 357.

Fundamental to freedom of expressive association, therefore, is freedom of choice in one's associations. As this Court made clear in both *Hurley*, 515 U.S. at 557, and *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000), this includes the choice to associate when one finds common cause with others, as well as the choice *not to* associate when one disagrees. A "fundamental rule of protection under the First Amendment," as this Court stated in *Hurley*, is "that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. Compelling individuals to associate with those who hold different or opposing views is tantamount to compelling them to affirm a belief that they do not hold. *See Elrod*, 427 U.S. at 356. *See also Dale*, 530 U.S. at 654 ("the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control"). In short, "[f]reedom to associate . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. *See also Hurley*, 525 U.S. at 573 ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'.").

Government infringes the freedom of expressive association not only when it actively coerces individuals to associate, but also when it compels individuals to pay financial support to a group that advocates causes to which they object. Thus, in *Abood v. Detroit Bd. of Education*, this Court held that a state could not compel non-union teachers to pay for a union's political activities, even though the state could constitutionally require the teachers to pay for the union's collective bargaining activities under an exclusive agency-shop arrangement. 431 U.S. at 235-36. Allowing one union to act as the exclusive bargaining agent for all teachers, the Court found, was vital to avoiding the "confusion and conflict" that could arise if rival unions were permitted to represent different factions of teachers. Requiring non-union teachers to pay service fees for the union's collective bargaining activities thus served compelling state interests. *Id.* at 225. *Accord Keller v. State Bar of California*, 496 U.S. 1, 13 (1990) (noting that agency-shop arrangements serve "vital national interests in preserving industrial peace"). Compelling dissenting teachers to pay for expressive activities unrelated to collective bargaining, however – activities such as political campaigning and lobbying – violated the teachers' freedom of speech and association protected by the First Amendment. *Abood*, 431 U.S. at 235-36. As the Court stated in *Abood*,

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he

> will, and that in a free society one's beliefs should be shaped by his mind and his conscience, rather than coerced by the State.

Id. at 234-35. *Accord Elrod*, 427 U.S. at 356 ("The financial and campaign assistance that [an individual] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief.").

The principle that emerges from these decisions is that government may compel individuals to finance group activity only when it has vital purposes for doing so that are unrelated to expression per se, and only when any expressive activities undertaken by the group are germane to such purposes. *See, e.g.*, *Dale*, 530 U.S. at 657-58 (to be constitutional, a law that affects the right of association must not "materially interfere with the ideas" sought to be expressed); *Roberts*, 468 U.S. at 623 (to be constitutional, a law must be "unrelated to the suppression of ideas"); *Keller*, 496 U.S. at 14 (state bar may use mandatory dues to fund only those activities that are germane to regulation of the legal profession).[4]

[4] Petitioners incorrectly contend that this Court's First Amendment cases impose only intermediate or even more lenient scrutiny on the mandatory assessments under the Beef Act. *See* U.S. Br. at 37; Private Pet. Br. at 39. This argument not only contradicts this Court's compelled assessment cases such as *Abood*, *Keller*, and others, it also conflicts with the Court's other right of association cases, which have squarely held that restrictions on the right of expressive association are assessed under *strict* scrutiny. That is so whether government attempts directly to prevent individuals from associating or to compel them to associate, *see, e.g.*, *Dale*, 530 U.S. at 657-60; *Hurley*, 515 U.S. at 574-81; *Roberts*, 468 U.S. at 623, or its actions indirectly infringe the right of association by, for instance, conditioning public employment on joining

(Continued on following page)

Thus, in *United States v. United Foods*, 533 U.S. 405 (2001), this Court struck down an act nearly identical to the Beef Act because the principal purpose of the law was to compel producers to finance a program of group speech. *Id.* at 415 ("We have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself."). While the analysis in *United Foods* focused primarily on freedom of speech rather than freedom of association, the principle applies equally to either right. Speech and expressive association are the *only* purposes of the Beef Act. The Act grants broad authority to a private association of beef producers – the Beef Board, the Operating Committee, and the NCBA – to speak for all beef producers, including those who disagree with the goals and the messages those entities promote. This Court's holding in *United Foods* demonstrates that the bare desire to increase demand for a particular commodity through advertising is not a compelling state interest that can justify requiring dissenting producers to associate for expressive purposes when they wish to remain independent. *Id.* The Beef Act thus violates Respondents' and other dissenting producers' rights to free speech and association.

II. THE BEEF ACT CONFLICTS WITH THE CONSTITUTIONAL VALUES THE RIGHT OF ASSOCIATION PROMOTES.

Petitioners admit that the purpose of the Beef Act is to compel beef producers to engage in a concerted effort to

or financially supporting a political party, *see Elrod*, 427 U.S. at 356-57, compelling disclosure of membership lists, *see NAACP v. Alabama*, 357 U.S. at 460-61, or restricting activities vital to an expressive association, *see NAACP v. Button*, 371 U.S. 415, 430 (1963).

promote beef as a generic product. Indeed, the program is mandatory precisely *because* the Act's proponents feared that individual producers would not voluntarily choose to advertise their products as the Act's proponents desired. *See* U.S. Br. at 17-18; Private Pet. Br. at 25. Similarly, the costs of the program were foisted on beef producers precisely *because* its proponents feared that taxpayers would not support the Act's goals if it were funded out of general revenues. *See* U.S. Br. at 29. Petitioners euphemistically describe the compulsion at the root of the Act as a solution to the "collective action" or "free rider" problems. *See* U.S. Br. at 17-18, 29; Private Pet. Br. at 44. One might more accurately describe it as an effort to squelch dissent. Whatever labels are used, however, the Beef Act compels producers to associate for expressive purposes with those whose views they oppose. The Act thus contravenes the constitutional values the right of association was designed to promote, and violates dissenting producers' First Amendment rights.

A. The Implicit Assumption Of The Beef Act Is That Government And Certain Producers Are Entitled To Speak For The Entire Industry.

Central to Petitioners' argument is that all beef producers' interests in promoting their products are identical and that no rational producer could object to the promotional programs the Beef Act mandates. Thus, the Secretary argues that it is appropriate for the government to compel producers to associate and to bear the costs of advertising and promotion under the Beef Act because producers "could reasonably be presumed by Congress to benefit from and agree with the central message of the

program – the 'desirability of beef and beef products'." U.S. Br. at 39. *See also id.* at 30 (arguing that beef producers "derive a particular benefit from the program").

This argument ignores the central premise of the First Amendment. The "general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 411 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). That principle applies whether the right at issue is speech per se or expressive association. As the Court made clear in *Hurley*, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." 515 U.S. at 576.

The autonomy at the root of freedom of association means that individuals need not justify their objections to some authority in order to exercise their right not to associate for expressive purposes. As this Court explained in *United Foods*, even though objections about the marketing of particular commodities may seem minor to some, "those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important to them as it is for other discrete, little noticed groups in society which values the freedom resulting from speech in all its diverse parts." 533 U.S. at 410. Thus, neither the courts nor the government may judge the sufficiency of an individual's objections before they are permitted to exercise their right to dissent. *See, e.g., id.* at 413 ("speech need not be characterized as political before it receives First Amendment protection"); *Dale*, 530 U.S. at 651 ("it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent);

Abood, 431 U.S. at 232 ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection"); *NAACP v. Alabama*, 357 U.S. at 460-61 ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing freedom to associate is subject to the closest scrutiny.").

In any event, there are legitimate reasons for beef producers to object to the advertising and promotional programs under the Beef Act. As Respondents here point out, the Beef Act promotes beef as a generic product. Respondents, however, believe that American beef is superior to imported beef and that particular types of beef are superior to others. J.A. 34-37; 58-80. The advertising and promotional programs they are compelled to finance under the Beef Act thus directly contravene their interest in distinguishing their products from others. The Beef Act also requires Respondents to associate with the Beef Board, the Operating Committee, and the NCBA. The NCBA in particular is a private trade association composed of only 40,000 beef producers. Respondents do not agree with the goals of the NCBA and object to being required to associate with it. J.A. 38.

Promotional materials created under and funded by the Beef Act also make specific claims that many producers might find objectionable. For example, on its website the Beef Board promotes irradiation as a means of promoting

food safety.[5] The Board also sponsors a website called "zip4tweens.com" whose stated purpose is to "help tween girls (about 8 to 12 years old) see the value of eating smart and being physically active."[6] Not surprisingly, the website advocates beef as an important part of every young girl's diet.[7] Like many of the promotional materials funded by the Beef Act, the website states prominently that it is "Sponsored by America's Beef Producers," thus attributing the views expressed to all beef producers, including those who object to the advertising under the Act. *Cf. Hurley*, 515 U.S. at 580 (relying on the possibility of misattribution of a message to those who object as one factor in finding unconstitutional a law that required the sponsors of a parade to allow other groups to march).

Whether claims such as these are true, false, good, or bad is beside the point. Doubtless, many producers agree with these claims. Others, such as Respondents, clearly do not. What matters for First Amendment purposes is that the Beef Board and Operating Committee enjoy broad discretion to fund advertising that makes a wide variety of claims, yet dissenting producers cannot withdraw their support from that advertising regardless of what messages

---

[5] *See* Beef Checkoff Educates Consumers About Irradiated Beef, May 12, 2004 (available at http://www.beefboard.org/dsp/dsp_content.cfm?locationId=1054&contentId=2622&contentTypeId=2). *See also* http://www.beefboard.org/documents/irradiation.pdf.

[6] *See* http://www.zip4tweens.com/why.html.

[7] *See, e.g.*, http://www.zip4tweens.com/why.html ("Alarmingly, less than 1% of teen girls meet the nutrition guidelines of the Food Guide Pyramid. Beef is an important member of the Pyramid's meat group and provides several key nutrients often lacking in the diets of girls and young women."); http://www.zip4tweens.com/along/cognition.html ("Protein helps your brain work. Protein is found mostly in foods from the meat and dairy group.").

it promotes.[8] Under the First Amendment, the choice to fund or not to fund a particular message is up to the individual, not the government or a majority of beef producers.

It is no answer to claim, as Petitioners do, that the Beef Act solves a "collective action" or "free rider" problem. *See* U.S. Br. at 17-18, 29; Private Pet. Br. at 44. Even if that were true, the argument simply begs the constitutional question at issue in this case. To say that dissenting producers might "free ride" off of the advertising of others presumes that they receive a benefit for which they are not paying. Implicit in that conclusion, however, is that dissenting producers have no legitimate disagreement with the message and no reason to dissent from the expressive activities of the group. Yet that is precisely the judgment that the First Amendment prohibits the government from making. It "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 579. As this Court stated in *Hurley*, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* What

[8] Advertising and promotional programs funded under other agriculture promotional acts make similar types of claims. For instance, the federal dairy promotion program is currently sponsoring advertising as part of the "got milk" campaign that claims that consuming dairy products promotes weight loss. *See, e.g.*, http://www.2424milk.com/ ("Milk your diet. Lose weight!"); http://www.whymilk.com/moms/images/weightloss_ad.jpg ("Drink Milk. Lose Weight?"). Promotional materials sponsored under the pork promotion program claim that "Pork's perfect for low-carb diets." *See* http://www.otherwhitemeat.com/allaboutpork/nutrition/porksPerfect.htm.

Petitioners call "free riding" is, to producers who disagree with the advertising and promotional activities under the Beef Act, simply a derogatory expression for "dissent." If the government and beef producers who support the Beef Act wish to solve this so-called "problem," they must do so within the confines of the First Amendment, through cooperation, discussion, and debate, rather than coercion.[9]

At bottom, the Beef Act is founded on the presumption that the government – or the Beef Board, or the Operating Committee, or the NCBA, or the majority of beef producers, or some combination thereof – knows what is best when it comes to promoting beef and may appoint a group of beef producers to speak for the entire industry. This Court has consistently rejected such presumption and paternalism in the realm of free speech in the past. "[G]overnment, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 791 (1988). *See also*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996)

[9] Petitioners' reliance on *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), for the proposition that the Beef Act can be justified by the government's "vital" interest in avoiding free riders is misplaced. *See* U.S. Br. at 40; Private Pet. Br. at 44. *Lehnert*, like *Abood*, involved the extent to which a union's expressive activities were related to *non-expressive* activities for which teachers could be compelled to pay union fees. The principle purpose of the mandatory fees in *Lehnert* was not speech per se, but facilitating collective bargaining, and this Court upheld only those activities that were germane to that purpose. *Id.* at 520-28. Here, by contrast, the principle purpose of the compelled subsidies is speech. Whether the claimed purpose of the beef program is to prevent "free riding" or simply to compel producers to pay special subsidies on the side the government favors, the program is still unconstitutional under *United Foods*.

(stating that the First Amendment counsels skepticism of government efforts to regulate speech for the public's own good); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("It is precisely the kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."). There is no reason to abandon that sound principle here.

B. The Beef Act Skews The Democratic Process Against Dissenting Producers.

Freedom of association is vital to the "competition in ideas" and diversity of views that forms the "core of our electoral process." *Elrod*, 427 U.S. at 357. The Beef Act undermines the protective benefits of the right of association in this context in two ways. First, as argued above, by requiring individual beef producers to associate with those with whom they disagree, the Beef Act enforces a sort of viewpoint orthodoxy as to what messages are promoted about beef and the industry in general. This runs directly contrary to this Court's admonition in *United Foods* that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." 533 U.S. at 411.

Second, the Beef Act actively inhibits dissenting producers' ability to convince other beef producers and even taxpayers to oppose the program and seek its repeal. After Respondent Livestock Marketing Association ("LMA") initiated a petition drive to obtain a referendum on continuation of the program under 7 U.S.C. § 2906(b), the Beef Board began actively promoting the Beef Act to

producers. These producer communications described the beef program as a "state-based," "industry-wide self-help tool" created and operated by and for beef producers and overseen by an "independent organization of 111 'grassroots' volunteers," and claimed that it is the "only industry-wide self-help tool cattlemen have to promote beef now and in the future." J.A. 81-93. In other communications, the government described checkoff programs as "similar to businesses, funded by shareholders . . . with a board of directors that is accountable to the shareholders," and stated that they are "funded entirely by their respective industries, NOT by taxpayers or government agencies." J.A. 101-02 (emphasis in original). *See also* J.A. 102 (claiming that checkoff programs "operate much like corporate businesses, with oversight by the federal government to ensure program accountability. In fact, checkoff programs reimburse the [USDA] for its oversight responsibilities.").

The point of these communications was obviously to convince beef producers and taxpayers not to oppose the Beef Act. *See* U.S. Br. at 29 (stating that the purpose of structuring the beef program as an industry-funded program was to prevent taxpayer opposition). While it is perfectly appropriate for individual beef producers to promote the Beef Act to others if they so choose, it is particularly insidious and undemocratic to require those who oppose the program not only to finance advertising with which they disagree, but to finance their opponents in a political debate about whether the program should continue.

Seen in this light, the Secretary's claims that Respondents should seek change under the referendum provisions of the Act or through the broader political process, rather

than in court, ring particularly hollow. *See* U.S. Br. at 19, 31-32. In the referendum process, dissenting producers face a Beef Board and Operating Committee armed with millions of dollars in mandatory checkoff funds – including dissenting producers' *own money* – that they can use to convince other producers that the dissenter's complaints are unfounded. If dissenting producers appeal to the broader political process, they will find taxpayers with no stake in the debate who have been told that the beef program is a private industry program, operated by and for private producers, and funded by private donations, rather than tax revenues. One would be hard pressed to conceive of a law better designed to favor the views of the majority and to squelch any dissent.

The Beef Act thus interferes with the free and open debate that is fundamental to our democratic system of government. As this Court has stated, the "illuminating source" to which we must turn in solving the inevitable conflicts among individuals that arise in a constitutional republic "is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." *Elrod*, 427 U.S. at 372. While it is perfectly appropriate for like-minded beef producers to associate in order to promote their products and their views about the industry in general, the First Amendment requires "that the rights of every citizen to believe as he will and to act and associate according to his beliefs be free to continue as well." *Id.*

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge this Court to affirm the decision of the Eighth Circuit and hold the Beef Act unconstitutional under the First Amendment.

Respectfully submitted,

WILLIAM H. MELLOR
STEVEN M. SIMPSON
Counsel of Record
SCOTT G. BULLOCK
INSTITUTE FOR JUSTICE
1717 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 955-1300

October 15, 2004

Counsel for Amici Curiae Joseph and Brenda Cochran and the Institute for Justice